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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC48/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

In the matter between

THE STATE

and

LIZZY MAPHEFO LEKGOTOANE Accused 2

MANOKO STANFORD DIHANGOANE Accused 3

JUDGMENT: 14 NOVEMBER 2019

MORRISON AJ

[1] At the close of the case for the prosecution, Mr. Madira for the accused brought an application for the discharge of Accused 2 and 3 in terms of section 174 of the Criminal Procedure Act, No. 51 of 1977.

[2] The accused was charged with the following offences:

2.1 Count 1: Contravention of section 3 read with sections 1, 103, 117, 120, and 121(a) read with Schedule 4 of the Firearms control Act 60 of 2000 and further read with section 250 of 1977, unlawful possession of a firearm, a 5.56 x 45mm calibre Vektor model LM5 assault rifle on 6 July 2018 at Soshanguve;

2.2 Count 2: Contravention of section 3 read with sections 1, 103, 117, 120(1)(a), and 121 read with Schedule 4 of the Firearms control Act 60 of 2000 and further read with section 250 of 1977, unlawful possession of a firearm, a 5.56 x 45mm calibre Dashprod model SAR M14 semi-automatic rifle on 6 July 2018 at Soshanguve;

2.3 Count 3: Contravention of section 90 read with sections 1, 103, 117, 120(1)(a), and 121 read with Schedule 4 of the Firearms control Act 60 of 2000 and further read with section 250 of 1977, unlawful possession of ammunition, 5.56 x 45mm calibre ammunition on 6 July 2018 at Soshanguve

2.4 Count 4: Contravention of section 90 read with sections 1, 103, 117, 120(1)(a), and 121 read with Schedule 4 of the Firearms control Act

60 of 2000 and further read with section 250 of 1977, unlawful possession of ammunition, 5.56 x 45mm calibre ammunition on 6 July 2018 at Soshanguve

2.5 Count 5: Contravention of section 18(2)(b) of the Riotous Assemblies Act 17 of 1956, a conspiracy to commit robbery, prior to and during December 2017, but including 10 December 2017 at or near Marikana village, in that the accused unlawfully and intentionally conspired with one another and other accomplices unknown to the State to aid or procure the commission of / or commit an offence of robbery with aggravating circumstances.

2.6 Count 6: Murder read with the provisions of section 51(1) of Act 105 of 1997, in that on 10 December 2017 at or near Marikana village the accused unlawfully and intentionally killed Klaas Mshoto Sehemo, an adult male by shooting him with a firearm

2.7 Count 7: Murder read with the provisions of section 51(1) of Act 105 of 1997, in that on 10 December 2017 and or near Marikana village the accused unlawfully and intentionally killed Isaac Lebtla Mathiba an adult male by shooting him with a firearm

2.8 Count 8: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Legeshe Gaborone Phoshoko, Klaas Sehemo, Isaac Mathiba and Boitumelo Mogale and with threats and violence take from them cash in the amount of R641 790.00, the property of Fidelity Cash Solutions or in their lawful possession.

2.9 Count 9: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Legeshe Gaborone Phoshoko and with threats and violence take from him a firearm, to wit a 9mm pistol with

serial number 0511174 containing 15 rounds of live ammunition, the property of Legeshe Gaborone Phoshoko or in his lawful possession.

2.10 Count 10: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault Boitumelo Mogale and with threats and violence take from him a firearm, to wit a ARO M16 rifle with serial number 851537 containing 30 live rounds of ammunition, the property of Fidelity Cash Solutions or in the lawful possession of the said Boitumelo Mogale.

2.11 Count 11: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault and with threats and violence take from Isaac Mathiba a firearm, to wit a 9mm pistol, the property or in the lawful possession of Isaac Mathiba

2.12 Count 12: Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977 and read with section 51(1) of Act 105 of 1997 in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally assault or with threats and violence take from Mpho Government Mlambo a firearm, to wit a 9mm pistol (P99), with serial number 02370 containing 15 live rounds of ammunition.

2.13 Count 13: Contravention of section 22(2),(3) read with sections 29 and 15(1)(a) of the Explosives Act 15 of 2003, Endangering Life or Property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally cause an explosion by igniting explosive inside the vehicle belonging to Fidelity Cash Solutions and thereby endangering life and / or property without being holders of a permit or licence issued in terms of the Explosives Act 15 of 2003 thereby contravening the provisions of the said Act.

2.14 Count 14: Malicious Injury to Property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally damage the property of Fidelity Cash Solutions, to wit an Isuzu bakkie with registration number [….] by shooting at it with firearms causing it to collide with another vehicle to wit a Golf 5 with registration number [….].

2.15 Count 15: Malicious Injury to Property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally damage the property of Fidelity Cash Solutions, to wit a truck with registration number [….] by shooting at it with firearms and igniting explosives inside it causing an explosion

2.16 Count 16: Malicious Injury to Property, in that on 10 December 2017 and or near Marikana village the accused did unlawfully and intentionally damage the property of Mpho Mlambo, by shooting at a Fidelity Cash Solutions' vehicle causing it to collide with his vehicle, to wit a Golf 5 with registration number [….].

2.17 Count 13 as framed in the indictment was unfortunately technically inaccurate. It was a combination of section 22(2) and 22(3) of the Explosives Act 15 of 2003, which are two discrete offences. At the commencement of the trial the Court brought this to the attention of both counsel. Defence Counsel did not raise any objection in terms of section 85 of the Criminal Procedure Act 51 of 1977 to count 13. State Counsel, Mr Koalepe indicated that he would take appropriate steps to remedy the charge.

[3] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 states the following:

3.1 Sometime during December 2017 including 10 December 2017, the accused and his accomplices presently unknown to the State, conspired with one another to attack the Fidelity vehicle carrying cash in and around

Soshanguve and Marikana village with firearms with the aim of robbing the security personnel after collecting cash from different businesses.

3.2 On 10 December 2017 the accused and his accomplices attacked the Fidelity vehicles with registration numbers [….] and [….] at or near Marikana village on the Soutpan road by firing several shots at them with rifles and hand guns causing them to come to a stop.

3.3 The deceased Klaas Sehemo who was the driver of the escort vehicle was shot and died at the scene. The cause of death was determined as “gunshot wounds of the chest”.

3.4 Isaac Mathiba who was a crew in the vehicle carrying the cash was also shot and died on arrival in hospital. The cause of death was determined as “perforating gunshot injury of the chest”.

3.5 The attackers (including the accused) took the firearms belonging to the security guards and that belonging to Mpho Mlambo, a police officer who was travelling passed (sic) the scene in his private vehicle. One of the attackers placed explosives near the safe in the vehicle (YMT 729) carrying the cash and caused an explosion. The safe containing cash was destroyed.

3.6 The accused and his accomplices took cash contained in the safe and fled the scene in different vehicles. The amount stolen was determined as R641 790.00.

3.7 On 06 July 2018 the police arrested the accused for possession of firearms (2x rifles) contained in a bag recovered in the house of accused no. 2 hidden under a bed in the bedroom. Both firearms had their serial numbers obliterated.

3.8 There were also hand gloves and balaclavas recovered inside the bag containing the firearms. DNA samples obtained from the cloves (sic) were analysed and found to match that of accused no. 3.

3.9 The forensic ballistic tests were conducted on the recovered firearms and were found to have been used to fire cartridges recovered on the scene on 10 December 2017.

3.10 The state alleges that the accused and other person unknown to the state acted in furtherance of a common purpose in the possession and use of the said firearms in the commission of various crimes and in hiding them from detection after their use."

The legal position

[4] Section 174 of the Criminal Procedure Act provides:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty."

[5] It is well established that "no evidence" does not mean no evidence at all, but rather no evidence on which a reasonable court, acting carefully, might convict.[1]

[6] The question whether a court should grant a discharge at this stage is one which entails a discretion by the trial court. It is a discretion which must, self-evidently, be exercised judicially.

[1] R v Shein 1925 AD 6; Rex v Herholdt & Others 1956(2) SA 722 (W); S v Mpetha & Others 1983(4) SA 262; S v Shuping & Others 1983(2) SA 119 (B); S v Lubaxa 2001(2) SACR 703 (SCA)

[7] The judicial pronouncements on the manner in which the trial court must exercise its discretion have over the years been contentious. I do not intend to give a full historical overview and will confine myself to a brief reference to those cases that helped to define the scope of the court's discretion in terms of section 174.

[8] In S v Shuping & Others, *(supra)*, Hiemstra, CJ reviewed the case law history of discharge applications and formulated the test as follows at 120 *in fine* to 121 A :

> "At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence."

[9] The second part of the latter test did not always find favour. In S v Phuravhatha & Others, 1992 (2) SACR 544 (V), Du Toit, AJ stated the following:

> "The presumption in favour of innocence, the fact that the *onus* rests on the State, as well as the dictates of justice in my view will normally require an exercise of the discretion under s 174 in favour of an accused person where the State case is virtually and basically non-existent. Strengthening or supplementation of a non-existent State case is a physical impossibility."

[10] Since the inception of our Constitutional order, conflicting views arose as to whether or not the Constitution has impacted on the test to be applied by a court in an application in terms of section 174. These decisions culminated in the Supreme

Court of Appeal finally deciding this issue in S v Lubaxa, 2001 (2) SACR 703 (SCA), *inter alia,* as follows:

> "[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence.
>
> [19] The right to be discharged at that stage of trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

[11] It has been held that the credibility of State witnesses at this stage of the proceedings only play a very limited role. In S v. Mpetha (*supra)*, Williamson, J held

that relevant evidence can only be ignored if "it is of such poor quality that no reasonable person could possibly accept it".

[12] This sentiment was also echoed and expanded on by Kgomo, J in S v Agliotti, 2011 (2) SACR 437 (GSJ), who stated the following at 456 *in fine* to 457b:

> "[272] In *S v Lavhengwa* 1996 (2) SACR 453 (W) the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self–incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused's silence in this context. …
>
> [273] I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also 'unwise to attempt to banish issues of credibility' in the assessment of issues in terms of s 174 or to 'confine judicial discretion' to 'musts' or 'must nots'."

[13] To therefore summarise the legal position regarding applications in terms of section 174:

(a) An accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;

(b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;

(c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.

[14] Mr Madira submitted heads of argument. He submitted that *in casu* the State is reliant n the testimony of Sgt Silinda, who *inter alia* is a single witness in relation to the arrival at accused 3's house and whose evidence is not credible enough to prove the charges proffered in counts 1 – 4 and therefore the approach in the case S v Agliotti *supra* and S v Ndlangamandla referred to in the Agliotti matter ought to be applied.

[15] To a large extent his argument covered the evidence of Capt Machete he submitted as his evidence was of no assistance to the State case as it contained inconsistencies compared to that of Silinda. A number of criticisms were levelled at Silinda's and Machete's evidence in the heads of argument and ultimately comparing their evidence with that of W/O Franschia's evidence as to what the latter saw at Accused 2's home contradicted Silinda and Machete's version of the events and reflected badly on their credibility.

[16] The inconsistency in regard to the number of rounds found in accused 2 ‘s home as compared to those received by Capt Mkhatshwa however is not oarticularly relevant to the adjucation of this application.

[17] At this point in time the Court has before it a plea explanation tendered by Accused 2 which is part of the probative material and the Court may take into account exculpatory parts of the statement, *cf* S v Cloete 1994 (1) SACR 420 (A) at 424 A – G, but her plea explanation is not evidence as it was not made under oath or affirmation, *cf Du Toit et al* Commentary on the Criminal Procedure Act 18 – 14 on section 115.

[18] In brief summary the defence case as put to the various State witnesses differs substantially from that of the State. One of the principle allegations was that the events in question commenced on the 5th July 2018 and not the 6th of July 2018 as Silinda, Cst Mabobo and other had gathered on the evening of 6 July 2018 at Rietgat Police station to decide how they were going to put together a case against the accused. Accused 3 denied ever having been in accused 2’s house when the bag was found and opened, having been seated in a car outside. He denied ever having made admissions that he had taken the bag to the former Accused 1’s house and that a certain Jabu and Themba had done so. Machete however stated that they would never have found the former accused 1’s or accused no 2’s house without the assistance of accused 3.

[19] W/O Makwasi, the investigating officer was called after Machete testified and was able to contextualise the various events and investigations that were being carried out by the task forces in the various areas within the Court's jurisdiction. Any criticism of his evidence and conducting an interview with accused 3 is of no real moment.

[20] I have to agree with State counsel at this stage that Machete and Silinda corroborated one another to a large degree. In any event any criticisms levelled at their testimony do not reach the level as held in the Agliotti case that it was of such poor quality that it had to be rejected.

[21] I must further agree with State counsel in considering accused 2's position that on the existing State evidence the former accused 1 had not interceded on behalf of accused 2 as set out in her plea explanation at the time of her arrest. The Sate further argued that the plea explanation statement was a fabricated version concocted by accused 2 some time after her arrest. She did not as one would have expected when she was arrested at her home vehemently deny any knowledge of the fact that there were firearms in the bag found hidden under a bed in her house in a locked bedroom. It may be remarked that the contents of the plea explanation in that regard as probative material can be utilised by the State in cross-examination to the truth thereof *cf Du Toit* 18 – 14.

[22] The ballistic and DNA evidence links accused 3 to the charges in question. The Dashprod assault rifle was used at the scene of the cash in transit robbery in

question. At this stage accused 2 and 3 are linked to the bag in which the said assault rifle was found by the police investigators.

[23] His version that the glove in the bag with the firearms in question, inside which his DNA was found, were his used for bicycle riding and were lent to Themba, at this stage is just an instruction to his counsel, and untested. Moreover there is further DNA evidence linking him to a balaclava in the same bag. Contamination of his DNA inside the glove onto the balaclava is far-fetched, but the DNA found is in competition with the DNA of numerous persons whose DNA was also found on the balaclava in question by the expert DNA witness Ms van Dyk / ne Cocks and has not much weight in concluding that accused 3 wore it or touched it.

[24] At this stage in exercising my judicial discretion I hereby dismiss the application brought on behalf of both accused.

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MORRISON AJ

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: **14 NOVEMBER 2019**

DATE OF JUDGMENT: **14 NOVEMBER 2019**

APPEARANCE FOR THE STATE: ADV KOALEPE

APPEARANCE FOR THE DEFENCE: MR. MADIRA